

KATHLEEN ZWAAN : CIVIL ACTION  
:  
v. :  
:  
ALAN K. SILBERSTEIN, et al. : NO. 96-1662

MEMORANDUM AND ORDER

Fullam, Sr. J. July , 1997

Plaintiff is suing the President Judge of the Philadelphia Municipal Court and various other court officials and entities, asserting that a court administrator sexually assaulted her, and that she was discharged from employment because she reported the incident to the police. The defendants have filed motions for summary judgment, and plaintiff has filed a motion for voluntary dismissal as to one defendant, which motion is opposed by the remaining defendants.

Because prompt disposition is necessary in view of the scheduled date for trial, and because the pertinent facts are well known to the parties and counsel, I shall dispense with a recitation of the facts.

I have concluded that the undisputed evidence conclusively establishes that plaintiff was an independent contractor, and not an employee of any of the defendants. For that reason, all of plaintiff's claims under Title VII will be dismissed.

Plaintiff seeks dismissal of her claims against the estate of the supervisor allegedly responsible for the sexual

assault. The only reason given is that plaintiff does not wish to press any claims against the estate, and wishes to reserve only her right to assert counterclaims in the event the estate should later decide to sue her. The defendant estate consents to the withdrawal of plaintiff's claims in this action, without prejudice. While the remaining defendants object, I am unable to discern any possible prejudice they would sustain by the voluntary dismissal sought by plaintiff. Defendants may be correct in asserting that plaintiff will have difficulty proving damages in certain categories (for emotional distress, for example). But the fact that plaintiff herself may be prejudiced by the voluntary dismissal does not adversely affect the remaining defendants. All relevant evidence will be admissible at trial. The motion for voluntary dismissal will be granted.

The defendant Silberstein seeks summary dismissal on the basis of immunity. It is true that high government officials performing discretionary functions are shielded from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights which a reasonable person would be aware of. See, e.g., Grant v. City of Pittsburgh 98 F.3d 116, 121 (3d Cir. 1996).

There can be no doubt that, at the time of the events pertinent to this case, the constitutional right of an employee not to be discharged or retaliated against for the exercise of a First Amendment right was clearly established but, says the defendant, it was not until June 28, 1996, when the Supreme Court decided Board

of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 116 S.Ct. 2342 (1996) that independent contractors had a constitutional right not to be terminated or retaliated against for the exercise of First Amendment rights. The defendant points out that, in Umbehr itself, the Supreme Court referred to a conflict among various courts of appeals on this subject, and listed the Third Circuit as not extending First Amendment protection to independent contractors. See Horn v. Kean, 796 F.2d 668 (3d Cir. 1986) (in banc).

My review of the reported decisions leads to the conclusion that the principal uncertainty which may be said to have existed was whether independent contractors, like employees, had a constitutional right not to be terminated or retaliated against for exercising their First Amendment right to political association; outside the political context there was no such uncertainty. For example, in Lefkowitz v. Turley, 414 U.S. 70 (1973) the high court ruled that independent contractors, just like employees, could not be required to waive their Fifth Amendment privilege as a condition of continuation of the relationship. In short, on this issue, I agree with the decision of Judge Rambo in Labalokie v. Capitol Area Intermediate Unit, 926 F.Supp. 503 (M.D. Pa., 1996).

Defendant makes the further argument that reporting sexual harassment was not recognized as protected speech at the time the incidents occurred. While I am inclined to doubt the validity of that assertion, I need not consider it in this case, because plaintiff did far more than simply complain about sexual

harassment: she exercised her fundamental First Amendment right to report a crime to the police. If, as plaintiff claims, the defendants summarily terminated her contract, and conducted an outrageous vendetta of reprisal against her, because she reported a sexual assault to the police, a reasonable person in the defendants' position would have realized that serious violations of plaintiff's constitutional rights were being committed.

Defendants Silberstein and Schneider also seek dismissal of plaintiff's claims for invasion of privacy, asserting that they did nothing more than conduct a reasonable and permissible investigation into allegations of financial mismanagement by plaintiff, and the circumstances surrounding the suicide of the court administrator, Mr. Murray. But if plaintiff's allegations are true, there is more to her case than that: the investigation included extensive inquiries of plaintiff's former associates and acquaintances, concerning plaintiff's morals and sexual practices; the release of transcripts of salacious interviews to the public press; and defamatory statements to the press concerning plaintiff. Plaintiff is entitled to an opportunity to prove her version of these disputed factual issues.

Disputed issues of material fact also preclude granting summary judgment on the defamation claim asserted in Count VIII and the claim for intentional infliction of emotional distress in Count XI-A and XI-B.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KATHLEEN ZWAAN	:	CIVIL ACTION
	:	
v.	:	
	:	
ALAN K. SILBERSTEIN, et al.	:	NO. 96-1662

ORDER

AND NOW, this        day of July, 1997, IT IS ORDERED:

1.    Counts I through V of plaintiff's amended complaint are DISMISSED with prejudice.

2.    Count IX (obstruction of justice) is DISMISSED with prejudice.

3.    As to the defendant Sigmund G. Morawski, Administrator of the Estate of Kevin R. Murray, Deceased, plaintiff's amended complaint is DISMISSED, without prejudice, to the right of plaintiff to reassert these claims as counterclaims, in the event she is later sued by the defendant being dismissed.

4.    In all other respects, all pending motions for summary judgment are DENIED. The case will proceed to trial against the remaining defendants, Silberstein and Schneider.

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John P. Fullam, Sr. J.